

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WAYNE BERRY,

Plaintiff,

vs.

DEUTSCHE BANK TRUST COMPANY
AMERICAS (FKA BANKERS TRUST
COMPANY) and JP MORGAN CHASE
BANK in their separate capacities and as
agents for the pre- and post-petition lenders of
Fleming Companies, Inc.; GENERAL
ELECTRIC CAPITAL CORPORATION;
C&S WHOLESALE GROCERS, INC.; THE
POST-CONFIRMATION TRUST OF
FLEMING COMPANIES, INC.; ROBERT
KORS; CORE-MARK HOLDINGS INC. and
DOES 1 to 200,

Defendants.

Case No. 01:07 CV 7634 (WHP)

ECF Case

SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE AND APPENDIX OF EXHIBITS IN
SUPPORT OF DEUTSCHE BANK TRUST COMPANY AMERICAS' AND
JP MORGAN CHASE BANK'S MOTION TO DISMISS

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In ruling on a motion to dismiss, a court may take judicial notice of matters of public record. *See Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.*, 369 F.3d 212, 217 (2d Cir. 2004) (stating that courts may “look to public records . . . in deciding a motion to dismiss”). And a court may take judicial notice of court documents. *See Cameron v. Church*, 253 F.Supp.2d 611, 623 (S.D.N.Y. 2003) (relying on court filings from an earlier case when dismissing claims on grounds of res judicata). Indeed, courts routinely take judicial notice of bankruptcy court dockets, and pleadings filed therein. *See, e.g., Colotone Liquidating Trust v. Bankers Trust N.Y. Corp.*, 243 B.R. 620, 622 n.2 (S.D.N.Y. 2000) (taking judicial notice of the confirmation order, plan of reorganization and the related trust instrument); *Buttes Gas & Oil Co. v. Cal. Reg’l Water Quality Control Bd. (In re Buttes Gas & Oil, Co.)*, 182 B.R. 493, 494 (Bankr. S.D. Tex. 1994) (taking judicial notice of the docket sheet and Bankruptcy Court file, and concluding therefrom that all of the debtor’s creditors are being paid pursuant to the plan).

Moreover, courts may take judicial notice of pleadings filed in other cases, and any admissions made therein, including where the statements a party made in those public records contradict those it makes in the present litigation. *See Rothman v. Gregor*, 220 F.3d 81, 92 (2d Cir. 2000) (taking judicial notice of a complaint filed in a related case); *Jackson v. Broadcast Music, Inc.*, 2006 WL 250524, at *7 (S.D.N.Y. Feb. 1, 2006) (noting that “court may take judicial notice of public records and of admissions in pleadings and other documents in the public record filed by a party in other judicial proceedings that contradict the party’s factual assertions in a subsequent action”).

Accordingly, Deutsche Bank Trust Company Americas and JP Morgan Chase Bank (collectively, “Defendants”) respectfully ask this Court to take judicial notice of the following documents, which are included as exhibits to this Supplemental Request, for purposes of

assessing the Defendants' motion to dismiss Plaintiff Wayne Berry's Second Amended Complaint:

1. Attached hereto as Exhibit U is a true and correct copy of Exhibit B to the Affidavit of Damian Capozzola in support of a complaint Fleming Companies, Inc. ("Fleming") filed in the Delaware Bankruptcy Court against Wayne Berry, on August 1, 2003 (*Fleming Companies, Inc. v. Wayne Berry*, Case No. 03-54809).

2. Attached hereto as Exhibit V is a true and correct copy of Wayne Berry's Objection to Fleming's Sale Motion, which Berry filed in the Delaware Bankruptcy Court on July 28, 2003 in *In re Fleming Companies, et al.*, Case No 03-10945 (MFW).

DATED: March 7, 2008

By: /s/ Michael E. Baumann
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